No. 47612-6-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

ANGELA EVANS

Appellant,

v.

TACOMA SCHOOL DISTRICT, NO. 10.;

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Appellant has clearly established that the Tacoma School District (TSD, hereafter), knew or should have known that their security guard on school grounds and during school hours, engaged in a abusing grooming/romantic relationship with Appellant's minor 17-year-old female daughter, Jasmine McFadden, at TSD's Science and Math Institute (SAMI). Clearly, a parent should have a viable cause of action under the facts of this case. Clearly, based on TSD's negligence, appellant's daughter was seduced and TSD saw it, allowed it to happen and took no action to remedy it.

Besides Mr. Brent exhibiting an inappropriate romantic interests with the 17-year-old daily in her classroom, the evidence established that Mr. Brent should never been hired, due to disqualifying criminal history and the absence of a valid driver's license.

It is the actions and negligence of the TSD that was a proximate cause of the harm to the appellant, a destroyed relationship with her daughter who ultimately moved in with the security guard and fled the State of Washington. Appellant's relationship with her daughter, who was a minor at the initiation of Mr. Brent's amorous attentions, has been forever and hopelessly compromised and destroyed.

II. COUNTER ARGUMENT

A. The Trial Court Erred In Dismissing Appellant's Common Law and Statutory Alienation of Affection Claims Against The Tacoma School District; Defendants' Assertion that this cause of Action Is No Longer Valid is False.

Defendants cite to case law that abolished "alienation of affection", marital claims only in the cases cited by TSD. All the cases cited by respondent TSD relate to the alienation of spousal affection, meaning that you cannot sue a part for luring away one's spouse. According to the cases cited by TSD, *Lien v. Barnett*, 58 Wn. App 680, 794 P.2d 865 (1990); *Lund v. Caple*, 100 Wn. 2d 739 (1984), and *Wyman. v. Wallace*, 15 Wn. App. 395 (1976), all stand for the proposition that there is no longer a claim for alienation of affection for a spouse and define the elements of the tort of alienation of affections as:

> (1) an existing marriage relation;
>
> (2) a wrongful interference with the relationship by a third person;
>
> (3) a loss of affection or consortium; and
>
> (4) a causal connection between the third party's conduct and the loss.

Lund, 100 Wn.2d at 745, (quoting *Carrieri v. Bush,* 69 Wn.2d 536, 542, 419 P.2d 132 (1966)). This has nothing to do with this present case, so it

is obviously misleading of respondent to assert such cases to stand for the assertion that RCW 4.24.020 has been abolished.

There is both a common law claim for alienation of a child's affection, as well as a statutory claim relating to the seduction of a child. There is both a common law claim for alienation of a child's affections, as well as a statutory claim relating to the seduction of a child. Such claims exist in Washington.

RCW 4.24.020 provides:

> "A father or mother, may maintain an action as a plaintiff for the seduction of a child, and the guardian for the seduction of a ward, though the child or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there is no loss of service."

This statute was last revised in 1973 and has not been repealed by the legislature. No case has ever held that the statute is invalid or otherwise unconstitutional. The only reported Washington case addressing the statute is *D.L.S. v. Maybin*, 103 Wn. App. 94, 121 P.3d 1210 (2005). Curiously, in the *D.L.S.* case, while clearly the facts stated therein supporting claims of negligent hiring, retention and supervision, such claims are not addressed, but rather the case was resolved in the employer's favor based on a lack of "apparent authority". Nevertheless, nowhere in the *D.L.S.* case is there any suggestion that a claim cannot be

brought pursuant to RCW 4.24.020, or that such a statutory cause of action was in any way infirm.

Similarly, the Washington Court of Appeals has recognized a common law claim for the alienation of a child's affections. *See Strode v. Gleason*, 9 Wn. App. 13, 510 P.2d 250 (1973). In the *Strode* opinion, which was also issued in 1973, the Court of Appeals clearly found that such a claim existed despite the fact that it had been rejected in a number of other states. Such a claim as discussed in 16 WAPRAC § 14:12 (4th ed. 2013), has the following elements:

(1) An existing family relationship;

(2) A malicious interference with the relationship by a third person;

(3) An intention on the part of the third person that such malicious interference results in a loss of affection or family association;

(4) A causal connection between the third party's conduct and the loss of affection; and

(5) Resulting damages.

As discussed in *Strode* at Page 20, "malicious" for the purpose of this tort action is simply an unjustified interference with the relationship between the parent and the child. As the alienation of affection of one family member to another is a "gradual process", the claim accrues when

the parent becomes aware that such alienation or loss of affection has occurred. *See also, Tyner v. DSHS*, 141 Wn.2d 68, 1 P.3d 1148 (2000) (wherein the Supreme Court permitted a parent to sue the state for damages to the parent/child relationship).

Here, Appellant has pled that as a result of the seduction/alienation of her minor child's affection, that she no longer has a relationship with that child. Such allegations, standing alone should have been sufficient to defeat TSD's motion to dismiss under the appropriate application of CR 12(b)(6) standards. Under the circumstances of this claim, Appellant has both a statutory and common law claim.

Further, there is nothing within Washington law which conclusively establishes that such claims can only be brought against the "seducer" and not the seducer's employer under *respondeat superior* principles. It was inappropriate for the Trial Court to dismiss under CR 12(b)(6) standards, plaintiff's claims against TSD on the grounds that it cannot be held vicariously liable for the actions of Mr. Brent. The question whether or not an employer can be vicariously liable for the action of its employees is typically a question of fact. See *Rahman v. State* 170 Wn. 2d 810, 816, 246 P. 3d 182 (2011), (superseded by statute as applied to the state of Washington). The *doctrine of respondeat superior* holds that an employer is liable for acts of its employees that are

"within the scope of their employment." *Id.,* citing to *Dickinson v. Edwards* 105 Wn. 2d 457, 466, 716 P. 2d 814 (1986). An employer can be liable for the misconduct of its employee even if such misconduct violates the employer's workplace rules, orders or instructions. *Id.*

Contrary to the suggestions of the defense, there is no *per se* rule that indicates that intentional acts and/or criminal misconduct necessarily fall outside of the "scope of employment". *Robel v. Roundup Corp.* 148 Wn. 2d 35, 53-54, 59 P. 3d 611 (2013). This is because an employee's conduct will only be deemed "outside the scope of employment" if it is "different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master." *Id* citing to Restatement (2d) of Agency § 228(2) (1958). As a matter of fact, it was shown through discovery that Mr. Brent groomed the Appellant's daughter while attending to his regular "security guard" job duties within his Tacoma School District employment. Much of the activity alleged in the complaint occurred on school grounds, while in part, Mr. Brent was engaging in the job responsibilities he was hired to perform. It goes without saying that if Mr. Brent was not employed by the school district, he probably would have never met or had contact with Appellant's daughter. It's likely, that Mr. Brent's conduct was a mixture of actions performed both within and without the scope of his employment.

However, merely because some of the conduct was performed outside of the scope of Mr. Brent's employment, does not necessarily take the school district "off the hook".

Even if we assume *arguendo* that Mr. Brent's conduct fell outside of the "scope of his employment", nevertheless, the school district has an independent duty to be non-negligent in the hiring, retention and/or supervision of its employees. See *Nice v. Elm View Group Home,* 131 Wn. 2d 39, 929 P. 2d 420 (1997). Employers are liable for negligent hiring, retention and supervision if the employer knew, or in the exercise of reasonable care, should have known that the employee presented a risk of danger to others. See *S.H.C. v. Lu* 113 Wn. App. 511, 517, 54 P. 3d 174 (2012). Such a limited duty is imposed upon an employer and owed by the employer to foreseeable victims "to prevent the task, premises, or instrumentalities entrusted to an employee from endangering others." See *Bety Y. v. Al-Hellou*, 98 Wn. App. 146, 149, 988 P. 2d 1031 (1999). Liability in this regard has been imposed in a wide variety of circumstances, including, for example, when a dangerous employee has been hired in a position of responsibility without an appropriate background check. See *Carlsen v. Wackenhut* 73 Wn. App. 247, 252, 868 P. 2d 882, review denied, 124 Wn. 2d 1022, 81 P. 2d 255 (1994); see also *Rucshner v. ADT, Security Systems, Inc.* 149 Wn. App. 655, 204 P. 3d 271

(2009). See also *La Lone v. Smith* 39 Wn. 2d 167, 172, 234 P. 2d 893 (1951), (an employer is liable for the criminal assault on third person when the employer had a reason to believe that there was an undue risk of harm because of the employment).

Here, Appellant specifically alleged at Paragraph 4.9, that school district personnel had knowledge, and were aware, (or should have been aware), of the relationship between J.M. and Mr. Brent. Thus, even on the face of the complaint, the allegations set forth therein, separate this case from those cases relied on by the defense. For example in *Peck v. Siau, supra*, the school district was not liable for the teacher's off-campus sexual assault of a student where it did not know, nor reasonably should have known, of the risk posed by the teacher). In the case of *Bratton v. Caulkin* 73 Wn. App. 492, 870 P. 2d 981 (1984), the Appellate Court did not address negligent supervision retention and/or hiring within its opinion. Similar to *Peck,* in *Thomson v. Everett Clinic,* although the Appellate Court addressed negligent supervision as an independent cause of action, the Court found that the victim had failed to establish that the employer knew or should have known of the potential dangerous tendencies of the employee. See 71 Wn. App. 548, 555, 86 P. 2d 1054 (1993).

Here, the above stated facts sets forth specific allegations regarding such knowledge, therefore these cases should be found to be unpersuasive particularly under CR 12(b)(6) standards.

Indeed, given the allegations set forth at Paragraph 4.9 of the Complaint, the Court should be mindful, as discussed below, that not only were school district personnel aware of such a relationship, (or should have been), but also of the fact that they are mandatory reporters of such misconduct under the terms of RCW 26.44. et. seq., which in part is designed not only to protect the child victims of abuse, but also places parents within the protected sphere.

Whether under *respondeat superior* or negligence hiring, retention and/or supervision principles, liability can be imposed against the school district either for the actions of Mr. Brent under the legal theories discussed below or the inactions on the part of school staff personnel who failure to act and report the illicit relationship between J.M. and Mr. Brent.

B. The Trial Court Erred in Dismissing Plaintiff's Negligent Hiring, Training, Supervision and Retention Claims.

It is acknowledged that typically negligent supervision type claims are not available when a claim otherwise could be brought under *respondeat superior* principles. See *LaPlant v. Snohomish County*, 162

Wash. App. 476 271 P.3d 254 (2011). Thus, even if it is assumed it can be established under CR 12(b)(6) standards that Mr. Brent's conduct was too far removed from the "scope of his employment", the Trial Court nevertheless committed error by dismissing plaintiff's negligent hiring, training, supervision and retention claims. Even if we assume *arguendo* that Mr. Brent's conduct fell outside of the "scope of his employment" nevertheless the school district has an independent duty to be non-negligent in the hiring, retention and/or supervision of its employees. See *Nice v. Elm View Group Home,* 131 Wn. 2d 39, 929 P. 2d 420 (1997). Employers are liable for negligent hiring, retention and supervision if the employer knew, or in the exercise of reasonable care, should have known that the employee presented a risk of danger to others. See *S.H.C. v. Lu* 113 Wn. App. 511, 517, 54 P. 3d 174 (2012). Such a limited duty is imposed upon an employer and owed by the employer to foreseeable victims "to prevent the task, premises, or instrumentalities entrusted to an employee from endangering others." See *Bety Y. v. Al-Hellou*, 98 Wn. App. 146, 149, 988 P. 2d 1031 (1999). Liability in this regard has been imposed in a wide variety of circumstances, including, for example, when a dangerous employee has been hired in a position of responsibility without an appropriate background check. See *Carlsen v. Wackenhut* 73 Wn. App. 247, 252, 868 P. 2d 882, review denied, 124 Wn. 2d 1022, 81 P.

2d 255 (1994); see also *Rucshner v. ADT, Security Systems, Inc.* 149 Wn. App. 655, 204 P. 3d 271 (2009). See also *La Lone v. Smith* 39 Wn. 2d 167, 172, 234 P. 2d 893 (1951) (an employer is liable for the criminal assault on third person when the employer had a reason to believe that there was an undue risk of harm because of the employment). The Court erred in dismissing these claims under CR 12(6)(b).

C. A Parent Has a Cause of Action Pursuant to RCW 26.44.030 When a School District Fails to Report the Abuse of The Child.

RCW 26.44.030 requires professional school personnel with "reasonable cause to believe that a child suffers abuse or neglect" to report the suspected abuse to DSHS or the proper law enforcement agency. In *Beggs v. DSHS*, 171 Wn.2d 69, 77, 247 P.3d 421 (2011) our Supreme Court recognized there was an implied cause of action against a mandatory reporter who fails to report suspected abuse. RCW 26.44.030(1)(a) defines "abuse or neglect" in relevant part, as "sexual abuse, sexual exploitation, or injury of a child by a person under circumstances which causes harm to the child's health, welfare, or safety."

In *Beggs* the Supreme Court recognized that there is an implied tort cause of action based on the language set forth within RCW 26.44.030. In reaching such a conclusion the Supreme Court relied on its

previous decision in the case of *Tyner v. DSHS, supra* wherein, based on a different part of the same statutory scheme, the Court found that the legislature intended a remedy for parent victims of negligent child abuse investigations, and provided such parents with a cause of action.

In both *Tyner* and *Beggs,* the Court looked to the test for implied statutory remedies set for within *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), in order to determine whether or not an implied cause of action should be provided from a statute which did not provide for an express tort remedy. Under the *Bennett* test the following questions must be asked:

> "First whether the plaintiff is within the class who especial benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation."

In *Tyner* the court looked to RCW 26.44.010 in order to aid in the determination as to whom was intended to be "especially" benefited by the statute. RCW 26.44.010 provides in part "The State of Washington legislature finds and declares; the bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian or guardian ...".

Based on such language, the court in *Tyner* found that a parent was amongst the class of individuals intended to be benefited by the procedural safeguards set forth within RCW 26.44.050 and had an available cause of action for negligent investigation.

In *Beggs*, the Court similarly looked to *Bennett*. As *Beggs* is based on the duty to report set forth within RCW 46.44.030, part of the same statutory scheme at issue in *Tyner*, it would make no sense and would be absurd not to look to RCW 26.44.010 also for a determination as to whether or not a parent was amongst the class of individuals intended to be benefited by the implied statutory remedy recognized in *Beggs*. *See also Ducote v. DSHS*, 167 Wn.2d 697, 222 P.3d 785 (2009) (only a parent and not stepparents, fall within the class of individuals protected with an implied cause of action for negligent investigation under RCW 26.44.050). As recognized in *Tyner* at Page 80 "... The legislature's emphasized interest of a child and parent are closely linked. RCW 26.44.010. Thus, by recognizing the deep importance of the parent/child relationship, the legislature intended a remedy for both the parent and child if that interest is invaded."

Additionally by permitting a claim pursuant to RCW 26.44.030 by a parent whose child is a victim of unreported abuse would be consistent with the underlying purpose of the statutory scheme and the requirements

of RCW 26.44.030. As in *Tyner,* "The existence of some tort liability will encourage [mandatory reporters] to avoid negligence conduct and leave open the possibility that those injured by [mandatory reporters'] negligence can recover." *Id.* at 81 citing to *Babcock v. State*, 116 Wn.2d 596, 622, 809 P.2d 143 (1991). "Accountability through tort liability ... may be the only way of assuring a certain standard performance by governmental entities." *Bender v. City of Seattle*, 99 Wn.2d 582, 590, 664 P.2d 492 (1983).

There's nothing within the formulation of this cause of action within either the *Beggs* or *Tyner* opinions which indicates that such an applied cause of action only applies to individuals who failure to report as opposed to their employing entities and/or agencies. Indeed both the *Beggs* and *Tyner* case involve claims directly brought against the employing agency, in those instances, DSHS. Further, under the above discussed *respondeat superior*/scope of employment principles discussed above, there is simply no reason why vicarious liability would not apply to the *negligent failure to report perpetrated by an entity's employees. A negligent failure to report is far from intentional conduct which otherwise could (but not necessarily would) support a finding that such actions occurred outside of scope of employment.*

Thus, the school district's position in that regard, as posited below, is simply erroneous. The fact that the various members of the Tacoma School District knew of the inappropriate relationship occurring between Brent and Jasmine McFadden, does not absolve the Tacoma School District from liability, but rather is indicative that it also violated the terms of Subsection .030, just like teacher Brouillette. Given the amount of contact between Mr. Brent and Jasmine in Ms. Brouillette's classroom, or on the campus in general when Jasmine was a minor, if anything, is indicative of a failure to "report" the abuse and grooming despite the fact they clearly had a statutory duty to do so. This is especially true when the Tacoma School District's own teacher regularly observed Mr. Brent in her class when he had no legitimate reason to be there, along with former student Ms. Moore's testimony that he spent the entire class period every day flirting with Jasmine while she was a minor.

As it is, there is simply little doubt that there is at least a question of fact that the Tacoma School District through its employees had enough information, to be held liable under the terms of RCW 26.44.050 for failing to report Mr. Brent, and it should be left to the jury to make a determination as to whether or not had the District acted responsible, Mr. Brent's actions could have been prevented.

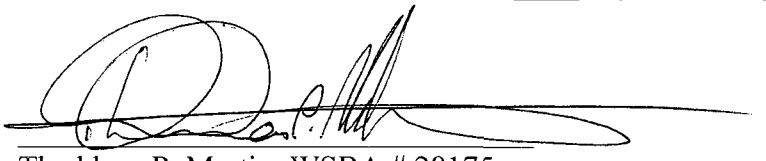
II. CONCLUSION

For the reasons stated above, it is respectfully prayed that the Appellate Court reverse the Trial Court's decision to dismiss plaintiff's alienation of affections claims and negligent hiring, retention and supervision claims.

It is further requested that the court reverse the Trial Court's grant of summary judgment on plaintiff's RCW 26.44.030 failure to report claim. Clearly there are factual issues with respect to such claim which undoubtedly vests a cause of action with a parent.

This matter should be reversed and remanded for a trial on the merits.

RESPECTFULLY SUBMITTED this 4th day of January, 2016.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF THE FOREGOING DOCUMENT ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

Charles P. Leitch
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[XXX] by causing a full, true, and correct copy thereof to be E-MAILED to the party at their last known email address, on the date set forth below followed by regular mail.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Lakewood, Washington on the 4th day of January, 2016.

Kara Denny

Kara Denny, Legal Assistant